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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 133
MISCELLANEOUS

EARL R. DEEN,

Petitioner,

v.

HON. J. E. HICKMAN, Chief Justice, and
HON. W. ST. JOHN GARWOOD, *et al.*, Associate Justices of
The Supreme Court of Texas,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

and

PETITION FOR WRIT OF MANDAMUS

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and

PETITION FOR WRIT OF MANDAMUS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner, Earl R. Deen, and moves the Court for leave to file the Petition for a Writ of Mandamus hereto annexed, or, in the alternative, moves the Court for Writ of Certiorari on separate petition filed contemporaneously herewith.

Petitioner further moves the Court that an order and rule be entered and issued, directing the Honorable J. E. Hickman, Chief Justice and the Honorable W. St. John Garwood, Meade F. Griffin, Robert W. Calvert, Clyde E. Smith, Frank P. Culver, Jr., Ruel C. Walker, James R. Norvell and Joe R. Greenhill, Associate Justices of The Supreme Court of Texas, in their capacities as Chief Justice and Associate Justices of The Supreme Court of Texas, to show cause why a Writ of Mandamus should not issue against them in accordance with prayer of said petition, and why your petitioner should not have such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

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s ROBERT LEE GUTHRIE

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July 11, 1958.

In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 133

MISCELLANEOUS

EARL R. DEEN,

Petitioner,

v.

HON. J. E. HICKMAN, Chief Justice, and HON. W. ST. JOHN GARWOOD, *et al.*, Associate Justices of The Supreme Court of Texas,

Respondents.

PETITION FOR WRIT OF MANDAMUS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now petitioner, Earl R. Deen, of Brown County, Texas, and respectfully shows that the Honorable J. E. Hickman is the duly elected, qualified and acting Chief Justice of The Supreme Court of Texas, is a citizen of Texas, and has an official residence in Austin, Travis County, Texas; and that the Honorable W. St. John Garwood, Meade F. Griffin, Robert W. Calvert, Clyde E. Smith, Frank P. Culver, Jr., Ruel C. Walker, James R. Norvell and Joe R. Greenhill are the duly elected, qualified

and acting Associate Justices of The Supreme Court of Texas, are citizens of Texas and have their official residences in Austin, Travis County, Texas, and all of the respondents were such officials and so acting at all times referred to herein. The purpose of this petition is to obtain from this Honorable Court under the authority of section 1651 (a) of the *Judicial Code* [*28 U. S. C. A. sec. 1651 (a), June 25, 1948, c. 646, 62 stat. 944, amended May 24, 1949, c. 139, sec. 90, 63 stat. 102*], a writ of mandamus to compel compliance with and prevent an invasion and annulment of the judgment and opinion of this Honorable Court entered on April 8, 1957, and on which a mandate was issued on May 10, 1957 in No. 199, October Term, 1956, entitled *Earl R. Deen v. Gulf, Colorado and Santa Fe Railway Company* and filed in the Court of Civil Appeals of Texas at Eastland on May 13, 1957. The opinion of this Honorable Court is reported in *353 U. S. 925, 77 S. Ct. 715.*

I. STATEMENT OF THE MATTER INVOLVED

As appears from the record in said cause now on file with this Honorable Court, petitioner obtained a jury verdict and judgment on April 12, 1954 in the District Court of Brown County, Texas, against Gulf, Colorado and Santa Fe Railway Company under the Federal Employers Liability Act for $21,450.00, with interest and costs (R. 157). Such judgment on appeal to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas was reversed and the Court decreed that Deen recover nothing *(275 S. W. 2d 529)*. The Supreme Court of Texas re-

fused Writ of Error and this Honorable Court granted a Writ of Certiorari to the Court of Civil Appeals of Texas to review said judgment and the cause was argued before this Honorable Court on April 1, 1957. Thereupon, this Honorable Court reversed the judgment of the Court of Civil Appeals of Texas, taxed the costs in the Supreme Court of the United States against Gulf, Colorado and Santa Fe Railway Company, and remanded the cause for execution and proceedings "in conformity with the judgment and decree of this Court * * *."

In its opinion and in the mandate issued to the Court of Civil Appeals of Texas this Honorable Court said:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

After remand the Court of Civil Appeals refused to consider the contention of the railway company that petitioner's evidence was insufficient to support the jury's conclusion of employer negligence holding it was precluded from considering this point by the judgment and the mandate of the Supreme Court of the United States. (Opinion of the Court enclosed with record—*306 S. W. 2d 171.*) The Court of Civil Appeals then considered the other points presented, but not acted on by the Court on the former appeal, and not decided by the Supreme Court of the United States. The Court of Civil Appeals found that none of these other points presented reversible error, with the exception the Court found the damages, as found by the jury and the trial court, were excessive in the amount of

$5,500.00, and ordered Deen to file a remittitur for the amount or else the cause would be reversed to the trial court for further proceedings. (Opinion of the Court of Civil Appeals in Record accompanying this Petition.) Deen filed a remittitur on October 6, 1957, but reserved the right in case of further appeal to question the correctness of the Court of Civil Appeals' ruling that the verdict of the jury and the judgment of the trial court were excessive (Deen's Motion for Rehearing in the Court of Civil Appeals in new Record accompanying this Motion). The Court of Civil Appeals of Texas then reformed the judgment of the trial court and rendered judgment in favor of Deen. The railway company filed an application for writ of error to The Supreme Court of Texas and thereafter Deen filed an Application for Writ of Error. (Applications in new Record.) The Supreme Court of Texas granted the railway company's application on the ground that the mandate of the Supreme Court of the United States did not preclude the Court of Civil Appeals from inquiring into the sufficiency of the evidence to support the jury's verdict of employer negligence and granted Deen's application, complaining that the action of the Court of Civil Appeals, in declaring the jury verdict excessive and requiring a remittitur, had deprived him of the right of trial by jury given him by the FELA. After a hearing, The Supreme Court of Texas affirmed all of the rulings of the Court of Civil Appeals (including the one requiring a remittitur of $5,500.00) except The Supreme Court of Texas reversed the Court of Civil Appeals on the point that the mandate

of the Supreme Court of the United States precluded it from inquiring into the sufficiency of the evidence to support the jury's conclusion of employer negligence and remanded the case to the Court of Civil Appeals directing it to inquire into the sufficiency of the evidence to support the jury's conclusion of employer negligence on its independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States. (Opinion of The Supreme Court of Texas is attached hereto.)

The Supreme Court of Texas violated the mandate of the Supreme Court of the United States in granting the railway company's writ of error on the point that the Court of Civil Appeals should inquire into the sufficiency of the evidence to support the jury's conclusion of employer negligence and thereafter in reversing and remanding the cause of the Court of Civil Appeals solely on the question that the Court of Civil Appeals should evaluate the sufficiency of the evidence to support the jury's finding of employer negligence wholly apart from the judgment of the Supreme Court of the United States.

The Supreme Court of Texas further disregarded the mandate of the Supreme Court of the United States by failing to issue execution for costs incurred by Deen in the Supreme Court of the United States, though that Court awarded him judgment therefor, and though such execution was twice requested in The Supreme Court of Texas. (Demand for Execution in the New Record and Deen's Appli-

cation for Writ of Error, p. 15.) On May 10, 1958, Deen filed Motion for Rehearing in The Supreme Court of Texas and the same was overruled on May 28, 1958. (See certified copy of Order of the Record.) Deen thereafter filed Motion to Recall Mandate and Record forwarded to the Court of Civil Appeals and to Stay Mandate Pending Application for Certiorari and the same was granted by The Supreme Court of Texas June 4, 1958. (Certified copy of Order in the Record.)

Petitioner has timely asked the Court of Civil Appeals of Texas and The Supreme Court of Texas to give effect to the mandate of the Supreme Court of the United States and has timely filed this petition.

No further relief can be obtained by petitioner in the Courts of the State of Texas. The Supreme Court of Texas is the highest court in said State in which decisions can be had in this cause. That Court has held that the action of the Court of Civil Appeals in taking away a substantial part of the damages, awarded Deen by the jury and the trial court on substantial evidence, did not deprive Deen of the right of trial by jury given him by the Congress under the FELA since the action of the Court of Civil Appeals of Texas was in accord with local practice. The Supreme Court of Texas has finally adjudged that the Court of Civil Appeals must inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury in spite of the holding of the Supreme Court of the United States that

the proofs justify with reason the jury's conclusion that employer negligence played a part in producing Deen's injury and in spite of the fact that the Court of Civil Appeals of Texas was so instructed in the mandate of the Supreme Court of the United States. In its mandate to the Court of Civil Appeals, The Supreme Court of Texas practically instructs the Court of Civil Appeals to find the evidence insufficient to support the jury's conclusion of employer negligence by stating that where the Court of Civil Appeals has found no evidence to support the jury verdict it would ordinarily assume the Court would now hold that the verdict is against the great weight and preponderance of the evidence (Opinion, p. 30). The Court of Civil Appeals of Texas acted promptly in making this finding and did so on May 16, 1958, and remanded the cause to the trial court for a new trial without awaiting the mandate of The Supreme Court of Texas and while Deen's Motion for Rehearing was still pending in The Supreme Court of Texas (Opinion of Court of Civil Appeals, May 16, 1958). The Court on its own Motion set aside its precipitate action four days later, on May 20, 1958. (Certified copy of the Order of the Court of Civil Appeals.) The only adequate remedy which petitioner has by which to enforce compliance with the judgment, opinion and mandate of this Honorable Court and to prevent the evasion and annulment thereof is by this Petition for Writ of Mandamus, or, in the alternative, by the Petition for Writ of Certiorari, contemporaneously filed herewith.

II. JURISDICTION

1. Jurisdiction to grant this petition is sustained by *Title 28 U. S. C. A. sec. 1651, sub-sec. a* (June 25, 1948 c. 646, 62 stat. 944 amended May 24, 1949 C. 139 sec. 90, 63 stat. 192).

III. QUESTION PRESENTED

Whether The Supreme Court of Texas has violated the mandate of the Supreme Court of the United States in directing the Court of Civil Appeals of Texas to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury when the Court of Civil Appeals was informed by the mandate of the Supreme Court of the United States that, "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury," and the Supreme Court of the United States directed the Court of Civil Appeals to proceed "in conformity with the judgment and decree of this Court above stated * * *."

IV. REASON RELIED ON FOR ALLOWANCE OF THE WRIT OF MANDAMUS

The sufficiency of the evidence to support the jury's conclusion of employer negligence was decided by the Supreme Court of the United States. After remand, as the Court of Civil Appeals of Texas, so decided, this matter was no longer left open for the determination of the Texas appellate courts. All other questions left open upon remand

of this cause by the Supreme Court of the United States have now been finally adjudicated by the Texas courts. While Deen has never conceded that the Texas appellate courts, under federal procedure applicable to FELA, had authority to require a remittitur of $5,500.00 on threat of reversing and remanding the case to the trial court for further proceedings, nevertheless, if the Court of Civil Appeals of Texas did have that authority, as The Supreme Court of Texas found, and if the remittitur should be applied to the judgment of $21,450.00, as The Supreme Court said, then in compliance with the opinion of the Supreme Court of the United States, and the opinion of The Supreme Court of Texas, nothing remained for The Supreme Court of Texas except the ministerial duty of rendering judgment in favor of Deen for $15,950.00, with interest and costs. Deen says the requiring of the remittitur was not in accordance with federal procedure and deprived him of the right of trial by jury but says The Supreme Court of Texas and the Court of Civil Appeals were not precluded by the mandate of the Supreme Court of the United States from considering this question and The Supreme Court of Texas having decided that the remittitur was proper owed a ministerial duty to render a judgment in accordance therewith, all other questions having been finally adjudicated, leaving to Deen his remedy to petition the Supreme Court of the United States by certiorari to set the remittitur aside. The Supreme Court of the United States has the authority and the duty to issue a Writ of Mandamus to the Justices of The Supreme Court of Texas to compel

them to perform a ministerial duty of rendering judgment in conformity to the mandate of the Supreme Court of the United States, where all questions, not embraced in the Mandate, have been finally adjudicated in The Supreme Court of Texas.

V. ARGUMENT AMPLIFYING REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In filing this Petition for Writ of Mandamus in the alternative, petitioner is requesting this Honorable Court to issue such Writ in the event that it does not issue its Writ of Certiorari as requested in a petition filed contemporaneously herewith. Dean asks this Honorable Court to consider the authorities and argument presented in the petition for certiorari filed herewith just as if such petition were fully copied herein. Petitioner has preserved the question, throughout the proceedings in the state courts after remand, whether the Texas appellate courts have a second time deprived him of the right of trial by jury by substituting their finding for that of the jury and the trial court on damages. Petitioner believes this question, not passed on by the Texas appellate courts in the previous appeal, and not passed on by the Supreme Court of the United States, was left open for adjudication by the mandate of the Supreme Court of the United States. However, this question has been decided in a manner conflicting with the decisions of the Supreme Court of the United States and the petitioner by certiorari is seeking to have this Court finally decide that question. If the decision of The

Supreme Court of Texas is a final judgment in that it finally adjudicates all issues between the parties, undisposed of by the Supreme Court of the United States, irrespective of the fact that in form it is not final, then a Writ of Certiorari appears to be the appropriate remedy. This Court has held that a decision of the highest state court that adjudicates all the issues between the parties is a final judgment despite the form in which it is worded.

Department of Banking v. Pink, 317 U. S. 264, 63 S. Ct. 233, 87 L. Ed. 257;

Market Street R. Co. v. R. R. Commission of Calif., 324 U. S. 548, 65 S. Ct. 770, 89 L. Ed. 1171;

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69, 67 S. Ct. 156;

Cole v. Violette, 319 U. S. 581, 63 S. Ct. 1204;

Pope v. Atlantic Coast Line R. Co., 345 U. S. 379, 73 S. Ct. 749.

It appears that the Supreme Court of the United States should look upon The Supreme Court of Texas as having done that which it ought to have done in the performance of its ministerial duty and therefore consider the judgment final.

Furthermore, even apart from the finality of the Texas judgment, it appears that this Honorable Court has the jurisdiction and the power to give effect to its own judgment and compel compliance therewith by writ of certiorari or mandamus when the court below has reached the point

that no further proceedings may be had without violating the mandate of this Court. *B. & O. RR. Co. v. United States*, 279 U. S. 781, 49 S. Ct. 492, 493.

However, if this Court should hold that it does not have jurisdiction to entertain a Petition for Writ of Certiorari, then the only adequate remedy petitioner has is a writ of mandamus issued by this Court to The Supreme Court of Texas. It would be futile for petitioner to seek any further relief in the Court of Civil Appeals of Texas. That Court has already said that it still considers the jury's finding of negligence was against the overwhelming weight and preponderance of the evidence. (Second Opinion of the Court of Civil Appeals: Third Opinion of Court of Civil Appeals reversing case to trial court without awaiting Mandate of the Supreme Court of Texas.) The Supreme Court of Texas in its mandate to the Court of Civil Appeals tells the Court that where a Court of Civil Appeals holds there is no evidence to support a jury verdict it ordinarily assumes that the Court will also hold the verdict is against the great weight and preponderance of the evidence. (Opinion of The Supreme Court of Texas.) If The Supreme Court of Texas is correct, all that the judgment of this Honorable Court established in the Deen case was Deen's right to require the Texas appellate courts to say: "The verdict is against the overwhelming weight and preponderance of the evidence," rather than, "There is no evidence to support the verdict" in taking the jury verdict away from him.

If Deen submitted to a new trial, it would be the duty of the trial court to take any verdict away from him under the decision of The Supreme Court of Texas, unless new evidence was introduced, and three decisions of the Court of Civil Appeals of Texas, one of The Supreme Court of Texas, and one of this Court, would have settled nothing of substance.

If this Honorable Court should hold that a writ of mandamus is the only appropriate remedy for petitioner at this time, then petitioner reserves the right to ask the Court to review the question at a later time, whether the Texas appellate courts have deprived him of the right of trial by jury by substituting their findings for that of the jury and the trial court on damages.

This Honorable Court has heretofore permitted the filing of a Petition for a Writ of Mandamus against a state court. In the case of *Ex Parte Texas, 315 U. S. 8, 86 L. Ed. 579, 62 S. Ct. 418*, this Court issued its order to show cause why The Supreme Court of Texas should not proceed consistent with the prior decision of this Court. Unlike the instant case the judgment and decree of this Honorable Court provided for further hearings on the issues of the case consistent with the rules laid down in the opinion of this Court concerning the admissibility of evidence. Those issues, after remand, had not yet been determined in the state courts. The mandate in the *Deen* case did not

permit The Texas Supreme Court to direct lower courts to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing Deen's injury, and the issues left open by the mandate of this Court have now been finally determined after remand. The authority of the Supreme Court of the United States to compel a state court to comply with its mandate has been stated by this Court in *Martin v. Hunter's Lessee*, 1 Wheaton 304, 4 L. Ed. 97.

If writs of certiorari can be prevented by state court's reversing and remanding causes for further proceedings irrespective of the mandate of the Supreme Court of the United States, and if this Honorable Court refuses to compel state courts to comply with its mandates by appropriate writs, then the decision of the Supreme Court of the United States in cases originating in state courts will be enforceable only to the extent the state courts are willing to enforce them. As this Court pointed out in the case of *Maguire v. Tyler*, 17 Wall (84 U. S.) 253, 21 L. Ed. 576, the refusal of a state court to proceed as directed by this Court would "operate as a repeal of the Constitution and the Laws of Congress passed to carry the judicial powers conferred by the Constitution into effect." If the proceedings in The Supreme Court of Texas are not corrected to conform to the judgment, opinion and mandate of this Court, then judges of state courts hereafter need not be

concerned with that part of Article 6 of the Constitution of the United States which provides that "This Constitution, and the Laws of the United States which shall be made in pursuance thereof * * * shall be the Supreme Law of the Land; and the judges in every state shall be bound thereby."

VI. CONCLUSION

The decisions of this Honorable Court in FELA cases have not received a friendly reception in the Texas appellate courts. Deen's Original Application for Writ of Error was refused by The Supreme Court of Texas two years ago on June 29, 1955 (R. 230). In *Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 225,* The Supreme Court of Texas told why it was refusing Application for Writ of Error in the *Deen* case. It brushed aside the great humanitarian decisions of this Honorable Court with the remark:

> "The decisions of the Supreme Court which are cited by the parties represent only that court's appraisal of the facts there involved, and are of little assistance in the determination of cases which are not factually analogous."

This statement clearly evidences an intent on the part of The Supreme Court of Texas to disregard the decisions of the Supreme Court of the United States by fine factual distinctions. When the appellate courts of Texas received

the mandate of this Honorable Court in the *Deen* case they have sought to evade it and render it ineffective. Neither the Court of Civil Appeals nor The Supreme Court have issued execution for costs adjudged to Deen by this Honorable Court though execution has been twice requested from each court.

In granting Writ of Error on the point that the Court of Civil Appeals should inquire into the sufficiency of the evidence to support the jury's conclusion of employer's negligence, independent of the mandate of the Supreme Court of the United States, and reversing and remanding the case to the Court of Civil Appeals with directions to go into this question The Supreme Court of Texas has twice violated the mandate of this Court.

WHEREFORE, petitioner respectfully submits in the alternative, and in the event this Honorable Court does not grant Petitioner's Petition for Writ of Certiorari filed contemporaneously herewith, that this Honorable Court issue its Writ of Mandamus to the members, hereinabove set out, of The Supreme Court of Texas, requiring The Supreme Court of Texas to vacate its judgment rendered on May 7, 1958 in this cause and requiring the said The Supreme Court of Texas to render a judgment and decree sustaining and affirming the judgment of the trial court rendered April 12, 1954 subject to a remittitur in the sum of $5,500.00, but without prejudice to Deen's right to seek review of such remittitur by this Court by Petition for

Writ of Certiorari and petitioner prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

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Of Counsel:

s/ ROBERT LEE GUTHRIE

ROBERT LEE GUTHRIE,
1608 Mercantile Bank Building,
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July 11, 1958.

THE STATE OF TEXAS)
COUNTY OF DALLAS)

Earl R. Dean, petitioner herein, states he has read the above and foregoing petition for writ of certiorari and that the statements therein contained are true and correct according to the best of his knowledge, information and belief.

s EARL R. DEEN

EARL R. DEEN

SUBSCRIBED AND SWORN TO, before me, at Dallas, Texas, this 11th day of July, 1958.

s LOIS BALLARD

Notary Public, Dallas County, Texas.

My Commission expires June 1, 1959.

CERTIFICATE OF SERVICE

I certify that a copy of Motion for Leave to File Petition for Writ of Mandamus and copy of this Petition for Writ of Mandamus have been mailed on the 11th day of July, 1958, to Honorable J. E. Hickman, the Chief Justice, and Honorable W. St. John Garwood, Meade F. Griffin, Robert W. Calvert, Clyde E. Smith, Frank P. Culver, Jr., Ruel C. Walker, James R. Norvell and Joe R. Greenhill, the Associate Justices of The Supreme Court of Texas c o The Supreme Court of Texas, Capitol Building, Austin, Texas; and also to Messrs. Wigley, McLeod, Mills and Shirley, Attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas; and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas, attorneys for Gulf, Colorado and Santa Fe Railway Company.

s ROBERT LEE GUTHRIE

ROBERT LEE GUTHRIE

APPENDIX

In the

SUPREME COURT OF TEXAS

No. A-6584

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,
Petitioner,

v.

EARL R. DEEN,
Respondent.

From Brown County, Eleventh District

The judgment here under review is one by the Court of Civil Appeals (306 S. W. 2d 171) affirming, upon condition of remittitur of $5500, a $21,450 judgment of the trial court in favor of the plaintiff Deen in his action for personal injuries against the defendant Gulf, Colorado and Santa Fe Railway Company under the Federal Employers' Liability Act, the affirmance being consequent upon reversal by the Supreme Court of the United States of the prior judgment of the Court of Civil Appeals in the same case, in which the latter court had held the verdict to be without support in the evidence.[1]

[1] Deen v. Gulf, Colorado and Santa Fe Railway Co., 353 U. S. 925, reversing Gulf, Colorado and Santa Fe Railway Co. v. Deen, 275 S. W. 2d 529, Tex. Civ App.

The principal questions are narrow ones involving the impact of the Supreme Court judgment of reversal upon the factual jurisdiction of our courts of Civil Appeals. The factual powers in question are: (a) that of reversing and remanding for a new trial, when the court believes the verdict or the fact findings of the trial judge to be so against the great weight and preponderance of the evidence as to be manifestly wrong, notwithstanding they may be supported by some evidence of substantial character[2]; (b) that of requiring, as a condition of affirmance and alternative to reversal and remand for a new trial, a remittitur of such portion of the damages as the court considers excessive.

Both the plaintiff employee and defendant employer being now petitioners in this court, they will be sometimes referred to herein by their respective trial court designations.

Deen's recovery in the trial court was by reason of a broken leg suffered in the course of his regular employment in the shops of the defendant as the result of an effort on the part of himself and an assisting fellow servant to dump a 550-pound piece of babbitt metal from an old melting pot preparatory to putting it into a new pot. The old pot, which was more or less the same size and shape of

[2] See "The Question of Insufficient Evidence on Appeal," 30 Tex. L. Rev. 803; King v. King, 150 Tex. 662, 244 S. W. 2d 660; Hopson v. Gulf Oil Corp., 150 Tex. 1, 237 S. W. 2d 352; also Ex Parte Texas, 315 U. S. 8, 13; Barker v. Coastal Builders, 153 Tex. 540, 271 S. W. 2d 798; Bowman v. Puckett, 144 Tex. 125, 188 S. W. 2d 571.

Rule 440, Tex. R. Civ. Proc.; Texas Pipe Line Co. v. Hunt, 149 Tex. 33, 39-40, 228 S. W. 2d 151, 155; Carter v. Texarkana Bus Co., Tex. , 296 S. W. 2d 753.

an ordinary kitchen sink and itself weighed some 250 pounds, was sitting on the floor, and the two employees sought to dump the metal content by lifting with their own hands the far edge of the pot more or less in their own direction, with the result that, when the metal fell out, it struck the plaintiff's leg.

There was a proper lifting crane or apparatus at hand which the plaintiff knew how to operate by himself, but which had, according to his evidence, no proper clamps or other implements whereby to affix the lifting chains to the edge of the pot for effective handling of this particular operation. The plaintiff, while a mere servant, was the one responsible for the particular work, understood it well, and had actually done it several times before by hand with the aid of three or four fellow servants, although the lifting in the latter instances was evidently done by raising the side of the pot nearest the lifters and thus dumping the contents away from them. In the present instance, the plaintiff, although not directed, or in any fashion required, to do the dumping operation himself, was attempting to do so, when his fellow servant voluntarily proceeded to help him. While it does not appear that additional assistants had been actually delegated by the foreman, or were standing nearby awaiting a chance to help, the evidence showed clearly that the plaintiff could have got all the needed assistance by asking for it, as, indeed, he had done in prior instances without difficulty.

Notwithstanding the foregoing, the plaintiff's suit was based expressly, perhaps necessarily, upon the combined propositions that he was not supplied with proper tools and that sufficient assistance was not properly afforded him to do the lifting by hand, as well as upon the further proposition that the defendant failed to give him proper supervision.

The jury found (a) that the accident proximately resulted from negligence of the defendant in failing to supply proper tools and that the plaintiff's total damages were $39,000; but it also found (b) that the defendant did *not* fail to give the plaintiff proper supervision, and (c) that the plaintiff himself was negligent in failing to obtain additional help and thus contribute to his own injury to the extent of 45 per cent. The trial court rendered judgment accordingly for the plaintiff in the net sum of $21,450.

The defendant thereupon appealed to the Court of Civil Appeals, presenting there, in due form and based on a proper record in the trial court, three alleged errors (along with others hereinafter discussed) to wit, (1) that the above-mentioned sole finding of negligence on the part of the defendant was unsupported by evidence, and that accordingly the appellate court should reverse and render judgment that the plaintiff take nothing, as the trial court should have done; (2) that (alternatively) the same finding was so against the great weight and preponderance of the evidence as to be manifestly unjust, and that

the appellate court should accordingly reverse and grant a new trial, as the trial court should have done; and (3) that the gross damages found ($39,000) were excessive. As before indicated, the Court of Civil Appeals, by its opinion reported in 275 S. W. 2d 529, sustained assignment (1) rendered judgment accordingly that the plaintiff take nothing, but did not in that opinion expressly rule or comment upon point (2) or the other remaining points.

The points in question, as indicated by the citations in footnotes 2 and 3, supra, respectively correspond to definitely separate, familiar and long-established institutions of Texas practice. Our practice recognizes important differences between (1) and (2). The former we have always considered as presenting a question of law and the latter one of fact. The problem in the former is merely to ascertain if there is any evidence of more than a *scintilla* to support the verdict. In the latter it is the quite different problem of balancing substantial evidence that supports the verdict against substantial evidence that is against the verdict and thus determining, for the sole purpose of ordering or not ordering a new trial, whether the great weight and preponderance of the evidence is against the verdict.

While the instant case concerns only the powers of our appellate courts, the two points, with their differences, also occur in the trial court. For example, the trial judge may refuse to submit a requested jury issue when he considers that the answer sought would be without support in the evidence and may accordingly instruct a verdict

and render judgment for the opposite party, or, having let the issue go to the jury, may later render judgment *non obstante veredicto* on the same ground. On the other hand, the judge can do none of these things where the issue or verdict has some support in the evidence, although the great weight and preponderance of the evidence may be the other way. In the latter situation he may grant a new trial, but, by reason of our constitutional guarantee of trial by jury, this is all he may do, and, under Rule 326 of our Rules of Civil Procedure, he may do it not more than twice in the same litigation.

On appeal, our Courts of Civil Appeals exercise the same powers as the trial judge in the matter of upholding or setting aside a verdict or verdicts by reason of evidence or deficiency therein. If the appellant raises only the law point of "No evidence", they affirm the judgment for the appellee when they consider the verdict to be supported by more than a *scintilla*, and, when they consider it not so supported they ordinarily reverse and render final judgment in the appellant's favor. If the appellant raises only the point that the verdict is against the great weight and preponderance of the evidence, the court, of course, affirms the trial court judgment when it considers the point to be without merit; but, when the point is considered well taken, the court merely remands for a new trial, and cannot make its own findings or render final judgment for the appellant in accordance with the greater weight and preponderance of the evidence. The action of the appellate court in such a situation is thus no more nor less than that of

the trial court when the latter grants or refuses a new trial on the same point. The particular appellate power derives directly from Art. V, Sec. 6, of the State Constitution. See the citations in footnote 2.

Often both points are raised on appeal. In that event the Court of Civil Appeals will ordinarily act first upon the point of "no evidence". If it considers the latter well taken, it will reverse and, ordinarily, render final judgment for the appellant, disregarding the point of weight and preponderance. But if it regards the point of "no evidence" as not well taken, that is, if it finds the verdict to be supported by more than a *scintilla* of evidence, it must then consider the point of weight and preponderance, affirming the trial court, if the point is not well taken and, if the contrary, reversing and remanding for a new trial.

The two questions also have different status in our Supreme Court. Being a court of law only, we will not review a holding of the Court of Civil Appeals that a verdict is or is not against the great weight and preponderance of the evidence, the holding being considered one of fact. We will, however, review a holding that the verdict is or is not supported by evidence, that matter being one of law. What we actually do with the case depends on the circumstances. For example, if we disagree with the holding of the Court of Civil Appeals that a verdict for the plaintiff is unsupported by evidence, we naturally reverse its judgment in so far as the latter decreed that the plaintiff take nothing; but if the defendant, as appellant

in that court, has also raised the factual question of weight and preponderance, and the court has not expressly passed upon it (having held that there was "no evidence") we must take a further step, since we ourselves cannot decide that question. In this situation we ordinarily assume that the court, having held "no evidence", would also hold the verdict to be against the great weight and preponderance of the evidence, and so we ourselves remand the case for a new trial, although if, for some special reason there were a doubt as to the view of the Court of Civil Appeals, we would remand to the latter court so that it might expressly pass on the weight and preponderance question, and accordingly order a new trial or affirm the trial court judgment, as the case might be.[4]

Sometimes the Court of Civil Appeals, having both points before it, overrules, for example, that of the defendant asserting the verdict to be without support in the evidence but fails to pass on the defendant's affirmative assignment that the verdict is so against the great weight and preponderance of the evidence as to require a new trial. In that situation we consider the failure of the appellate court to rule on the weight and preponderance point to be an error of law requiring us upon proper application to assume jurisdiction and to remand the case to the appellate court with direction to rule, and this although we may agree with its view that the verdict is supported by more than a *scintilla* of evidence. See King v. King, footnote 2, supra.

[4]Hopson v. Gulf Oil Corp.; Barker v. Coastal Builders; Bowman v. Puckett, footnote 2, supra.

In the instant case, as before stated, the Court of Civil Appeals in its first action (275 SW 2d 529) held the finding of negligence of the defendant in failing to furnish proper tools to be unsupported by evidence, reversing the trial court and rendering final judgment for the defendant, without commenting on the assignment concerning weight and preponderance, which latter could have conduced to no more than a new trial. We in turn upheld that judgment by denying writ of error, and the case, going on to the Supreme Court of the United States, was there reversed and remanded to the Court of Civil Appeals, 353 U.S. 925. If we had disagreed with the Court of Civil Appeals in its conclusion of "no evidence", instead of agreeing with it, as we did, we would yet not have affirmed the trial court, but would either have remanded the case to the latter for a new trial (on the above-stated theory that the Court of Civil Appeals had in effect held the finding of negligence to be against the great weight and preponderance of the evidence — a holding beyond our power of review) or would have remanded to the appellate court for an express ruling on the weight and preponderance question (with consequent grant of a new trial or affirmance of the trial court, as the case might be).

When the case returned from the Supreme Court of the United States to the Court of Civil Appeals, the defendant moved the latter court to remand forthwith for a new trial on the theory that the court had in its original opinion (275 SW 2d 529) in effect held the verdict to be against the great weight and preponderance of the evidence, when

it held it to be unsupported by evidence. Alternatively the defendant moved that the court consider and expressly sustain the assignment concerning weight and preponderance and, alternatively, certain other assignments, including one asserting the damages to be excessive. The court (306 SW 2d 171) denied the motion in all respects except as to the damages, which it found excessive in the sum of $5500. It thus in effect affirmed the judgment of the trial court upon condition of a remittitur. Ordinarily it would have either remanded for a new trial on the primary ground stated in the motion, or in any event have proceeded to give its own opinion as to whether the verdict was against the great weight and preponderance of the evidence. But it believed the decision of the Supreme Court of the United States to have foreclosed that question in favor of the plaintiff. Both parties now complain of this judgment of the Court of Civil Appeals. The defendant complains of its failure to remand the case for a new trial (as having by its earlier opinion in effect determined the verdict to be against the great weight and preponderance of the evidence) or to expressly rule upon the latter question and accordingly remand for a new trial. Alternatively, the defendant complains of the court's failure to remand on account of certain alleged errors concerning the pleadings and the charge, hereinafter discussed. The plaintiff, for his part, complains of the required remittitur.

Dealing first with the defendant's contentions concerning the matters of weight and preponderance of the evidence, they do not, of course, ask us to review what we

cannot review, because the Court of Civil Appeals has not exercised its own factual judgment upon the evidence, but has merely held, as a matter of law, that the effect of the reversal by the Supreme Court of the United States was to prevent it from exercising its own judgment on the point, or, perhaps, that the Supreme Court has itself determined that the verdict was *not* against the great weight and preponderance of the evidence. 306 SW 2d 171, 174. We think the Court of Civil Appeals erred in so holding.

The opinion of the Supreme Court and the relevant portions of its mandate of reversal to the Court of Civil Appeals are copied in the footnotes.

In Hopson v. Gulf Oil Corp., cited in footnotes 2 and 4, supra, we had before us almost the same question presented here, although the act under which the suit was brought was the Jones Act instead of the Federal Employers' Lia-

"PER CURIAM: We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. *Rogers v. Missouri Pac. R. Co.*, 352 U. S. 500; *Webb v. Illinois Cent. R. Co.*, 352 U. S. 512; Ferguson v. Moore-McCormack Lines, 352 U. S. 521. The judgment of the Court of Civil Appeals is reversed and the case remanded. Mr. Justice Frankfurter would dismiss the writ as improvidently granted. See his dissent in *Rogers v. Mo. Pac. R. Co.*, 352 U. S. 500, 524. Mr. Justice Harlan and Mr. Justice Whittaker dissent for the reasons given in Mr. Justice Harlan's opinion in *Rogers v. Mo. Pac.*, 352 U. S. 500, 559. Mr. Justice Burton dissents (353 U. S. 925).

"It is ordered and * * * adjudged * * * by this court that the judgment * * * of the said Court of Civil Appeals * * * in this cause be, and the same is hereby, *reversed with costs*.

"IT IS FURTHER ORDERED and adjudged by this Court as follows: We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. Rogers v. Missouri Pacific R. Co., 352 U. S. 500; Webb v. Illinois Central R. Co., 352 U. S. 512; Ferguson v. Moore-McCormack Lines, 352 U. S. 521.

"IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the Court of Civil Appeals of the State of Texas, Eleventh Supreme Judicial District."

bility Act, and the issue was not incident to a judgment of the federal Supreme Court in the same litigation.

In that case, as in the instant one, a trial court judgment for the plaintiff had been reversed by the Court of Civil Appeals and judgment rendered for the defendant on the ground that the finding of negligence of the latter was unsupported by evidence, the court omitting to rule upon the defendant's alternative point that the verdict was against the great weight and preponderance of the evidence. On writ of error to this court, the plaintiff contended that (a) the verdict had support in the evidence and (b) if we should so hold, we should affirm the judgment of the trial court rather than remand the case for a new trial as we would ordinarily do, since the policy of the Supreme Court of the United States in Jones Act and Federal Employers' Liability Act cases was much more liberal than that of the Texas courts in the matter of evidence necessary to uphold verdicts of negligence.

We sustained contention (1) but overruled contention (2) and remanded the case for a new trial on the theory that the plaintiff, by invoking the jurisdiction of the Texas courts, become bound by our established practice in the matter in question.[7]

[7] "Under our established practice, judgment will not be rendered on the jury's verdict, but the cause will be remanded to the district court for another trial. The trial court, on respondent's motion, rendered judgment that petitioner take nothing by his suit, for damages, notwithstanding the jury's findings that respondent's negligence in failing to furnished assistance proximately paused petitioner's injury. On the appeal by petitioner respondent presented in its brief filed in the Court of Civil Appeals several cross-asignments of error, one of them being that the evidence is insufficient to support the jury's answer to issue

(Continued on next page.)

To have held otherwise than we did would have in effect destroyed in cases of this kind the established Texas practice of granting new trials, when the Court of Civil Appeals finds the verdict to be against the great weight and preponderance of the evidence. Congress may, indeed, prescribe rules of substantive law within the federal field and

(Continued)

No. 8, the issue as to proximate cause. This practice is authorized by Rule No. 324 of the Texas Rules of Civil Procedure. The Court of Civil Appeals, in affirming the judgment of the district court, found that there is no evidence to support the jury's answer to issue No. 8. That finding of no evidence includes the lesser finding that the evidence is insufficient to support the answer to issue No. 8, and since the question of insufficiency was presented in the Court of Civil Appeals by respondent's cross-assignment, the cause must be remanded to the district court for a new trial. Liberty Film Lines, Inc. v. Porter, 136 Tex. 49, 53-54, 146 S. W. 2d 982; Bowman v. Puckett, 144 Tex. 425, 133-134, 188 S. W. 2d 571; Najera v. Great Atlantic & Pacific Tea Co., 146 Tex. 367, 371, 20 S. W. 2d 365.

"Relying on recent decisions of the Supreme Court of the United States, which manifest a tendency to sustain on very little evidence verdicts of juries in suits brought under the Jones Act and under the Federal Employers' Liability Act, petitioner in effect takes the position that the established practice in this state should be disregarded and that judgment should be rendered here on the jury's verdict. Among other authorities petitioner cites Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, and Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497. But neither of those decisions nor any other that we have found is authority for departure, in a suit under the Jones Act or under the Federal Employers' Liability Act, from our settled rules of procedure. By the institution of his suit petitioner invoked the jurisdiction of the state courts and the suit should be tried as any other suit for damages for negligence is tried in the state courts, provided there is compliance with the specific requirements of the Federal Statutes, that is to say, that assumed risk and negligence of fellow servants are not to be defenses and contributory negligence not a complete defense, and that the injured seaman or employee is entitled to trial by jury.

"Review of the jury's verdict by the Court of Civil Appeals under its jurisdiction over the facts, with reversal for want of sufficient evidence, does not amount to denial of the right of trial by jury. The Court of Civil Appeals does not and cannot substitute fact findings of its own for the findings of the jury, but in exercising its jurisdiction over the facts the Court of Civil Appeals may reverse the trial court's judgment and remand the case for another trial, when it finds that the verdict is so contrary to the great weight and preponderance of the evidence as to be clearly wrong. The power thus exercised is the same as that exercised by the trial court when it sets aside the jury's verdict on account of insufficient evidence and awards a new trial. And this practice is not a denial of the right of trial by jury. Choate v. San Antonio & A. P. Ry. Co., 91 Tex. 406, 409-410, 44 S. W. 69." (150 Tex. 1, 10-11, 237 S. W. 2d 352, 358.)

permit persons to seek relief there-under in Texas Courts, if Texas opens its courts to such actions, as it does; but obviously Congress would not presume to alter the practice of our courts, so long as it does not transgress constitutional limitations of due process, nor does Texas, by lending its courts for the more convenient operation of federal laws, surrender her right to have her courts follow their own system of practice. Surely it could not be held, for example, that in cases like the present, Congress could require the Texas courts to make use of only general verdicts instead of our usual practice of special verdicts or require that in a jury case a party might always appeal in our courts without regard to our requirement that he must first file a motion for a new trial.

Admittedly the Supreme Court of the United States does take jurisdiction to review the decisions of state courts under the Federal Employers' Liability Act which hold the verdict to be unsupported by evidence and render final judgment accordingly. Conceivably it will go further and review such decisions as merely reverse and remand for a new trial on the factual ground that the verdict, although supported by evidence of more than a scintilla, is yet against the overwhelming weight and preponderance of the evidence. But the latter step has not yet been taken, so far as we are advised, and the authorities cited to us indicate that it will not be.

If it was taken in the instant case, it was not clearly so. In the first place, the point made by the plaintiff in his

petition for *certiorari* was that, and only that, the Court of Civil Appeals, by its action in setting aside the verdict for "no evidence" and accordingly rendering judgment that he take nothing, had deprived him of his right to trial by jury specified in the act. True, he did pray the Supreme Court to affirm the trial court judgment in his favor, but this prayer was in effect denied him when the case was merely remanded to the Court of Civil Appeals, in which the defendant's other assignments of error remained without having been expressly adjudicated, including the assignment concerning the weight and preponderance of the evidence. Orders of the Supreme Court such as here involved are not usually construed as foreclosing further action in the state court except such as may be necessarily inconsistent with the order. Schneider Granite Co. v. Gast Realty & I. Co. U. S. 288. In cases like the present, moreover, the court, where it intends to adjudicate issues undisposed by the court *a quo*, ordinarily so states in unmistakable fashion. See the specific language concerning other assignments in Rogers v. Mo. Pac. R. Co., 352 U. S. 500, and in Webb v. Illinois Central R. Co., 352 U. S. 512.

Moreover, the question of great weight and preponderance of the evidence being, at least under our law, one of fact, there is doubt if the Supreme Court would pass upon it in any event. See Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 393-4.

As to the other attacks of the defendant upon the judgment under review, to wit, its upholding of the action of the trial court in (a) overruling the defendant's special exceptions to the plaintiff's pleading concerning "proper tools", (b) overruling the defendant's objections to the submission of Special Issues Nos. 1, 2 and 3 and related issues concerning the failure of the defendant to furnish "proper tools" and (c) rejecting the defendant's tendered Special Issue No. 5 concerning contributory negligence of the plaintiff "in placing his foot where the babbitt could and did strike same", we agree with the Court of Civil Appeals that none of these assignments presents reversible error.

Thus the, and the only, error which the Court of Civil Appeals has committed to the prejudice of the defendant is to hold, as it did, that the action of the Supreme Court of the United States has foreclosed the exercise of the independent judgment of the former upon the factual question of weight and preponderance of the evidence, depriving the appellate court of its power to reverse and remand for a new trial on that ground. This error requires that the decision below be reversed.

Consistently with our decisions cited in footnote 4, supra, we might ourselves now remand the case to the trial court for a new trial, but considering the peculiar circumstances of this case, and in the hope of making somewhat clearer

the basic issue decided, we shall remand the case to the Court of Civil Appeals with directions to the latter to adjudicate, upon its own independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States, whether or not the jury finding of negligence of the defendant in failing to furnish proper tools is so against the weight and preponderance of the evidence as to require a new trial in the interest of justice, and, upon the basis of its said adjudication, to either affirm the judgment of the trial court or grant a new trial.

What we have said disposes *a fortiori* of the complaint on the part of the plaintiff concerning that portion of the judgment below requiring the remittitur of $5500. It may be added that the function of the appellate court in this behalf is but another item of its factual jurisdiction and corresponds to the well recognized power of the trial judge to require a remittitur as alternative to granting a new trial. As evidenced by the citations in footnote 3, supra, this power, whether exercised by the Court of Civil Appeals or by the trial judge, is essentially but a part of the power to order a new trial and thus does not usurp the jury function of assessing damages. We find nothing in the Federal Employers' Liability Act or in the decisions of the Supreme Court of the United States purporting to negative the power of the state courts thus to require a remittitur, when the plaintiff invokes their jurisdiction, and certainly nothing in the decision of the Supreme Court in the instant case purporting to inhibit the action, which the Court of Civil Appeals has since taken in this respect.

The judgment of the Court of Civil Appeals is reversed and the cause is remanded to that court for further proceedings in accordance with this opinion.

W. ST. JOHN GARWOOD
Associate Justice

WSJG/p

Opinion delivered:
May 7, 1958

APPENDIX

In the

SUPREME COURT OF TEXAS

May 7, 1958

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

v.

EARL R. DEEN

From Brown County, Eleventh District

This cause came on to be heard on writs of error to the Court of Civil Appeals for the Eleventh Supreme Judical District, and the original transcript and the transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals, it is *adjudged*, *ordered* and *decreed* that judgment be, and hereby is, reversed and set aside and that this cause be, and hereby is, remanded to the said Court of Civil Appeals for further proceedings in accordance with the opinion herein this day delivered.

It is further ordered that respondent-petitioner, Earl R. Deen, pay the costs in this behalf expended and incurred in this Court; that petitioner-respondent, Gulf, Colorado & Santa Fe Railway Company, have and recover of and from

the said Earl R. Deen the costs by it expended and incurred in this Court, and that this decision, with a copy of the opinion, be certified to the Court of Civil Appeals for the Eleventh Supreme Judicial District for observance.

(Opinion of the Court by Associate Justice Garwood.)

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment of the Supreme Court of Texas in the case of the Gulf, Colorado & Santa Fe Railway Company v. Earl R. Deen, No. A-6584, from Brown County, Eleventh District, as such judgment appears of record in the minutes of said Court under date of May 7, 1958.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 13th day of June, 1958.

GEO. H. TEMPLIN, *Clerk*,
By CARL B. LYDA, *Deputy*

(SEAL)